

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER,

Plaintiff,

v.

MATTHEW CATE, FRANCISCO JACQUEZ,  
MICHAEL SAYRE, MAUREEN MCLEAN, SUE  
RISENHOOVER, JAMES FLOWERS, PAM  
LABANS, R. ROBINSON, DWIGHT  
WINSLOW, WILLIAM BARLOW, J.R.  
ANDRADA, and DOES 1-10,

Defendants.

No. C 09-2948 CW  
(PR)

ORDER REVIEWING  
COMPLAINT UNDER 28  
U.S.C. § 1915A,  
ORDERING SERVICE  
OF COGNIZABLE  
CLAIMS AND  
DISMISSING NON-  
COGNIZABLE CLAIMS

BACKGROUND

Pro se Plaintiff Todd Ashker, a California state prisoner incarcerated at Pelican Bay State Prison (PBSP), filed this civil rights complaint with pendant state law claims. The Court now reviews the claims under 28 U.S.C. § 1915A.<sup>1</sup> Venue is proper because the events giving rise to the claims are alleged to have occurred in counties located in this judicial district.

In his complaint, Plaintiff alleges the following. Plaintiff

<sup>1</sup>Plaintiff paid the full filing fee in this action; therefore, the Court reviews his complaint under § 1915A, not the provisions of the in forma pauperis statute (28 U.S.C. § 1915(e)).

1 has a permanently disabled right arm. As a result of his  
2 discomfort and inability fully to use his right arm and hand  
3 without experiencing pain, Plaintiff requires treatment that  
4 Defendants have failed to provide to him.

5 Plaintiff has filed several previous cases against PBSP  
6 medical practitioners and prison employees regarding the medical  
7 care he has received for his disabled right arm and wrist. In  
8 Ashker v. Cal. Dept. of Corrections, C 97-01109 CW, Plaintiff  
9 asserted, among other things, Eighth Amendment claims against  
10 prison officials based on inadequate medical care over a period of  
11 years for his right arm and wrist. On May 24, 2002, the parties  
12 entered into a Settlement Agreement with respect to Plaintiff's  
13 medical claims and final judgment was entered in that case on  
14 September 11, 2002. The 2002 Settlement Agreement provided that  
15 Defendants would pay Plaintiff \$37,500 in full settlement of all  
16 claims and that they would provide him with physical therapy,  
17 continued and appropriate use of an arm brace, referral to a pain  
18 management consultant at UC Davis Medical Clinic and  
19 implementation of the pain management regimen recommended by the  
20 UC Davis pain specialist. The 2002 Settlement Agreement provided  
21 that this medical care would continue until Plaintiff's medical  
22 needs changed.

23 Because PBSP medical practitioners and prison employees  
24 failed to adhere to the 2002 Settlement Agreement, Plaintiff  
25 initiated a new suit, Ashker v. Sayre, C 05-03759 CW, which  
26 advanced an Eighth Amendment civil rights claim as well as pendant  
27 state law claims. Issues regarding Plaintiff's medical care up to  
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1 June 18, 2007, the date Plaintiff filed a supplemental complaint,  
2 were litigated in that case. A jury returned a verdict for  
3 Plaintiff on May 22, 2009.

4 Plaintiff's instant complaint makes allegations concerning  
5 his medical care at PBSP from October 6, 2006 to the present. The  
6 named Defendants are identified as follows: (1) Matthew Cate is  
7 the Secretary of the California Department of Corrections and  
8 Rehabilitation (CDCR); (2) Francisco Jacquez is the warden of  
9 PBSP; (3) Michael Sayre is the chief medical officer at PBSP;  
10 (4) Maureen McLean is the health care manager at PBSP; (5) Sue  
11 Risenhoover is a nurse practitioner at PBSP; (6) James Flowers,  
12 Pam Labans and R. Robinson are registered nurses at PBSP;  
13 (7) Dwight Winslow is the statewide medical director of CDCR;  
14 (8) William Barlow is the litigation coordinator at PBSP; and  
15 (9) J.R. Andrada represented the defendants in Ashker v. Sayre,  
16 C 05-03759 CW.

17 The following claims for relief are stated: (1) under 42  
18 U.S.C. Section 1983 for violation of Plaintiff's Eighth Amendment  
19 rights by Defendants Cate, Jacquez, Sayre, McLean, Risenhoover,  
20 Flowers, Labans and Robinson in that they acted with deliberate  
21 indifference to his medical needs by withholding adequate medical  
22 treatment from him; (2) under 42 U.S.C. Section 1983 for violation  
23 of Plaintiff's Eighth Amendment rights and his Fourteenth  
24 Amendment rights to Due Process and Equal Protection by Defendants  
25 Cate, Jacquez, Sayre, McLean, Risenhoover, Flowers, Winslow,  
26 Barlow, and Andrada in that they conspired during the trial of  
27 Ashker v. Sayre, C 05-03759 CW, to commit perjury and submit  
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1 false evidence and declarations, failed to remedy systemic  
2 problems in the provision of medical care to inmates, and failed  
3 to provide adequate medical treatment to him; (3) state law claims  
4 based on "negligence - medical malpractice, intentional  
5 conspiracy" for failure to provide him adequate medical treatment  
6 and for conspiring to abuse the "CDCR-Administrative and Federal  
7 Court process."

8 LEGAL STANDARD

9 I. Title 28 U.S.C. Section 1915A

10 A federal court must conduct a preliminary screening in any  
11 case in which a prisoner seeks redress from a governmental entity  
12 or officer or employee of a governmental entity. 28 U.S.C.

13 § 1915A(a). In its review, the court must identify any cognizable  
14 claims and dismiss any claims that are frivolous, malicious, fail  
15 to state a claim upon which relief may be granted or seek monetary  
16 relief from a defendant who is immune from such relief. 28 U.S.C.  
17 § 1915A(b).

18 II. Title 42 U.S.C. Section 1983

19 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
20 allege two essential elements: (1) that a right secured by the  
21 Constitution or laws of the United States was violated, and  
22 (2) that the alleged violation was committed by a person acting  
23 under the color of state law. West v. Atkins, 487 U.S. 42, 48  
24 (1988). Pro se pleadings must be construed liberally. Balistreri  
25 v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

26 Conclusory allegations of a conspiracy which are not  
27 supported by material facts are insufficient to state a claim

1 under § 1983. Woodrum v. Woodward County, 866 F.2d 1121, 1126  
2 (9th Cir. 1989). Furthermore, a plaintiff must allege that a  
3 constitutional right was violated; conspiracy, even if  
4 established, does not give rise to liability under § 1983 unless  
5 there is such a deprivation. Id.

6 A supervisor may be liable under § 1983 upon a showing of  
7 personal involvement in the constitutional deprivation or a  
8 sufficient causal connection between the supervisor's wrongful  
9 conduct and the constitutional violation. Redman v. County of San  
10 Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation  
11 omitted). A supervisor therefore generally "is only liable for  
12 constitutional violations of his subordinates if the supervisor  
13 participated in or directed the violations, or knew of the  
14 violations and failed to act to prevent them." Taylor v. List,  
15 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable  
16 for implementing "a policy so deficient that the policy itself is  
17 a repudiation of constitutional rights and is the moving force of  
18 the constitutional violation." Redman, 942 F.2d at 1446.

#### 19 DISCUSSION

##### 20 I. Res Judicata

##### 21 A. Legal Standard

22 Res judicata, or claim preclusion, prohibits the re-  
23 litigation of any claims that were raised or could have been  
24 raised in a prior action. Western Radio Servs. Co., Inc. v.  
25 Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (citing Federated  
26 Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)). The  
27 purpose of the doctrine is to "relieve parties of the cost and  
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1 vexation of multiple law suits, conserve judicial resources, and,  
2 by preventing inconsistent decisions, encourage reliance on  
3 adjudication." Marin v. HEW, Health Care Financing Agency, 769  
4 F.2d 590, 594 (9th Cir. 1985) (quoting Allen v. McCurry, 449 U.S.  
5 90, 94 (1980)). Res judicata operates where there is "1) an  
6 identity of claims, 2) a final judgment on the merits, and  
7 3) identity or privity between parties." Western Radio, 123 F.3d  
8 at 1192 (citing Blonder-Tongue Lab. v. University of Ill. Found.,  
9 402 U.S. 313, 323-324 (1971)).

10 Two claims or causes of action are the same, for purposes of  
11 the first prong of the res judicata test, if they arise from the  
12 same transaction or series of transactions. Two claims are part  
13 of the same transaction or series of transactions where they share  
14 a factual foundation such that they could have been tried  
15 together. Western Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th  
16 Cir. 1992). "Different theories supporting the same claim for  
17 relief must be brought in the initial action." Id. Likewise, all  
18 evidence pertinent to a particular claim must be raised in the  
19 initial action because "when a court of competent jurisdiction has  
20 entered a final judgment on the merits of a cause of action, the  
21 parties to the suit and their privies are thereafter bound not  
22 only as to every matter which was offered and received to sustain  
23 or defeat the claim or demand, but as to any other admissible  
24 matter which might have been offered for that purpose."  
25 Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597  
26 (1948) (internal quotation marks omitted).

## 1 B. Discussion

2 On June 18, 2007, Plaintiff filed a supplemental complaint in  
3 Ashker v. Sayre, C 05-03759 CW. Any claims concerning Plaintiff's  
4 medical care at PBSP that were ripe as of June 18, 2007 could have  
5 been made in the supplemental complaint, so Plaintiff is now  
6 barred by res judicata from raising any of those claims in a new  
7 suit. In this complaint, although Plaintiff makes allegations  
8 concerning his medical care during the period from October 6, 2006  
9 to the present, the Court will not consider events that occurred  
10 before June 18, 2007, unless a claim involving these events was  
11 not ripe as of June 18, 2007. In particular, Paragraphs 183  
12 through 274 of the complaint are copied verbatim from a  
13 declaration that Plaintiff submitted to the Court on September 29,  
14 2006 in Ashker v. Sayre, C 05-03759 CW (Docket No. 53). The Court  
15 finds that all claims arising from these allegations were ripe as  
16 of June 18, 2007. Accordingly, the Court disregards Paragraphs  
17 183 through 274 of the complaint.

## 18 II. Conspiracy During Trial

19 Plaintiff alleges that Defendants Cate, Jacquez, Sayre,  
20 McLean, Risenhoover, Flowers, Winslow, Barlow and Andrada conspired  
21 to violate his constitutional rights during the litigation of  
22 Ashker v. Sayre, C 05-03759 CW. Plaintiff alleges that these  
23 Defendants fabricated information in medical records submitted to  
24 the Court, committed or suborned perjury in declarations and trial  
25 testimony, and tampered with evidence. These allegations form the  
26 basis for part of Plaintiff's second claim under 42 U.S.C. Section  
27 1983 and for part of Plaintiff's third claim under state law.

1 Participants in a trial have absolute immunity from liability  
2 for civil damages under Section 1983 for giving perjured testimony  
3 at trial and for conspiring to present their own or another  
4 witness's perjured testimony at trial. Franklin v. Terr, 201 F.3d  
5 1098, 1099 (9th Cir. 2000). This litigation privilege applies to  
6 tort claims under California state law as well. Silberg v.  
7 Anderson, 50 Cal. 3d 205, 212 (1990). "The usual formulation is  
8 that the privilege applies to any communication (1) made in  
9 judicial or quasi-judicial proceedings; (2) by litigants or other  
10 participants authorized by law; (3) to achieve the objects of the  
11 litigation; and (4) that have some connection or logical relation  
12 to the action." Id. Thus, Defendants are immune from state tort  
13 claims and claims under 42 U.S.C. Section 1983 for the alleged  
14 conspiracy and perjury.

15 Moreover, Plaintiff does not allege facts that would establish  
16 that the alleged conspiracy affected his medical treatment, in  
17 violation of his Eighth Amendment rights. Nor does Plaintiff  
18 allege facts that would establish that the alleged conspiracy  
19 resulted in a violation of his Fourteenth Amendment rights of Due  
20 Process and Equal Protection. Indeed, despite the alleged  
21 conspiracy, Plaintiff prevailed in Ashker v. Sayre, C 05-03759 CW.  
22 Thus, Plaintiff does not state a cognizable constitutional or state  
23 law claim arising from the alleged conspiracy.

24 Defendant Barlow, the litigation coordinator at PBSP, and  
25 Defendant Andrada, who represented the defendants in Ashker v.  
26 Sayre, C 05-03759 CW, are named only because of their alleged  
27 involvement in the alleged conspiracy. They are not alleged to be  
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1 involved in the provision of health care to Plaintiff. Therefore,  
2 Plaintiff states no cognizable claims against them.

3 III. State Law Claims

4 Plaintiff advances state law claims that are based on the same  
5 allegations that underlie his federal constitutional claims. As  
6 stated above, no cognizable state law claims arise from the alleged  
7 conspiracy during his previous litigation; any cognizable state law  
8 claims must be based on Plaintiff's allegations concerning his  
9 medical care.

10 Plaintiff alleges that Defendants are liable to him for  
11 negligence because they have breached their duty of care to ensure  
12 that he does not suffer unnecessary pain and aggravation of his  
13 underlying medical condition. Because a review of Plaintiff's  
14 Eighth Amendment claim also requires a review of his allegations  
15 concerning medical care, the question whether Plaintiff has a  
16 cognizable negligence claim against a particular Defendant will be  
17 considered together with the question whether Plaintiff has a  
18 cognizable Eighth Amendment claim in the next section.

19 IV. Eighth Amendment Claim Based on Deliberate Indifference to  
20 Serious Medical Needs

21 In his first and second claims for relief, Plaintiff alleges  
22 that Defendants have violated his Eighth Amendment right to be free  
23 from cruel and unusual punishment because they have acted with  
24 deliberate indifference to deny him the medical care he requires.

25 A. Legal Standard

26 Deliberate indifference to serious medical needs violates the  
27 Eighth Amendment's proscription against cruel and unusual  
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1 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin  
2 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
3 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th  
4 Cir. 1997) (en banc). A determination of "deliberate indifference"  
5 involves an examination of two elements: the seriousness of the  
6 prisoner's medical need and the nature of the defendant's response  
7 to that need. Id.

8 A "serious" medical need exists if the failure to treat a  
9 prisoner's condition could result in further significant injury or  
10 the "unnecessary and wanton infliction of pain." Id. (citing  
11 Estelle, 429 U.S. at 104). The existence of an injury that a  
12 reasonable doctor or patient would find important and worthy of  
13 comment or treatment; the presence of a medical condition that  
14 significantly affects an individual's daily activities; or the  
15 existence of chronic and substantial pain are examples of  
16 indications that a prisoner has a "serious" need for medical  
17 treatment. Id. at 1059-60 (citing Wood v. Housewright, 900 F.2d  
18 1332, 1337-41 (9th Cir. 1990)).

19 A prison official is deliberately indifferent if he knows that  
20 a prisoner faces a substantial risk of serious harm and disregards  
21 that risk by failing to take reasonable steps to abate it. Farmer  
22 v. Brennan, 511 U.S. 825, 837 (1994). The prison official must not  
23 only "be aware of facts from which the inference could be drawn  
24 that a substantial risk of serious harm exists," but he "must also  
25 draw the inference." Id. If a prison official should have been  
26 aware of the risk, but was not, then the official has not violated  
27 the Eighth Amendment, no matter how severe the risk. Gibson v.

1 County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

2 In order for deliberate indifference to be established,  
3 therefore, there must be a purposeful act or failure to act on the  
4 part of the defendant and resulting harm. McGuckin, 974 F.2d at  
5 1060; Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404,  
6 407 (9th Cir. 1985). A finding that the defendant's activities  
7 resulted in "substantial" harm to the prisoner is not necessary,  
8 however.

9 Once the prerequisites are met, it is up to the fact-finder to  
10 determine whether deliberate indifference was exhibited by the  
11 defendant. Such indifference may appear when prison officials  
12 deny, delay or intentionally interfere with medical treatment, or  
13 it may be shown in the way in which prison officials provide  
14 medical care. McGuckin, 974 at 1062.

15 B. Discussion

16 Plaintiff alleges that he continues to experience significant  
17 pain from his injured arm. He also alleges that on December 20,  
18 2008, he was examined by a pain specialist, Dr. Carl Shin.  
19 (Complaint, ¶ 306.) Dr. Shin's findings are cited to support  
20 Plaintiff's allegations about his pain and limitations. If  
21 Plaintiff's allegations are found to be true, the injury to his arm  
22 would constitute a serious medical need. Thus, whether Plaintiff  
23 has a cognizable claim against a particular Defendant for violation  
24 of the Eighth Amendment due to deliberate indifference depends on  
25 the nature of the Defendant's response to that need. The Court  
26 considers the allegations made about each Defendant.

1           1. Defendant Flowers

2           Plaintiff alleges that Defendant Flowers, a nurse at PBSP, was  
3 aware of Plaintiff's serious medical needs, that on multiple  
4 occasions Plaintiff complained of severe pain to Flowers, who  
5 recorded the health care request as "routine," and that as a result  
6 Plaintiff did not receive the treatment required for his level of  
7 pain. (Id., ¶¶ 277, 278, 281.) Deliberate indifference can be  
8 inferred from these allegations. Plaintiff has stated a cognizable  
9 claim for violation of the Eighth Amendment against Defendant  
10 Flowers.

11           As a nurse, Defendant Flowers has a professional duty of care  
12 to those he treats. Plaintiff alleges breaches of that duty,  
13 causing him to experience unnecessary pain. Plaintiff's  
14 allegations present a prima facie case for negligence, a cognizable  
15 state law claim, against Defendant Flowers.

16           2. Defendants Labans and Robinson

17           Plaintiff alleges that on August 2, 2007, Defendants Labans  
18 and Robinson, nurses at PBSP, made a notation in his medical file  
19 that he had a history of drug abuse. Plaintiff alleges that this  
20 statement is false and that, despite numerous administrative  
21 requests, he has been unable to have the notation removed.  
22 Plaintiff claims that a notation of drug abuse in his record is  
23 used to deny him needed pain medication. Plaintiff has alleged a  
24 cognizable claim for negligence against these Defendants. However,  
25 these allegations do not state an Eighth Amendment claim against  
26 these Defendants.

## 3. Defendant Risenhoover

Plaintiff alleges that he met with Defendant Risenhoover, a nurse practitioner at PBSP, on numerous occasions when she ignored his complaints and did not provide adequate care. As an example, Plaintiff alleges that

Ashker had repeatedly told Risenhoover the ibuprofen/tylenol was not adequate, and hurt his stomach causing chronic diarrhea, and his pain was to point [sic] of causing prolonged sleep loss etc etc, on at least (30) occasions, between Oct. 6, 2006 and Dec. 19, 2008. Her response was, "that's all you have coming in SHU [Secure Housing Unit], it's your choice, take it or leave it."

(Id. ¶ 293.) Thus, Plaintiff alleges that Defendant Risenhoover was aware of his serious medical need, and of the risk that his pain would continue if she did not act, and she deliberately failed to act to relieve the continuing pain. Plaintiff's allegations state a cognizable Eighth Amendment claim against Defendant Risenhoover.

As a nurse practitioner, Defendant Risenhoover has a professional duty of care to those she treats. Plaintiff alleges breaches of that duty, causing him to experience unnecessary pain. Plaintiff's allegations present a prima facie case for negligence against Defendant Risenhoover.

## 4. Defendant Sayre

Plaintiff filed a 602 appeal<sup>2</sup> on September 3, 2008 and

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<sup>2</sup> The 602 appeals process is an administrative remedy within the California Department of Corrections and Rehabilitation that provides a procedure for prisoners to have their grievances resolved by prison officials.

1 Defendant Sayre, the chief medical officer at PBSP, was responsible  
2 for the first level of review. (Id. ¶¶ 297-98.) The appeal  
3 presented complaints that Plaintiff's arm pain was not being  
4 adequately treated and that he had not had proper sleep for months.  
5 (Id.) The appeal requested that he be prescribed adequate  
6 medication and that he be seen by a qualified specialist. (Id.)  
7 Although regulations required Defendant Sayre to respond to the  
8 appeal within thirty days, he did not respond until December 2,  
9 2008. (Id.) Defendant Sayre partially granted Plaintiff's appeal  
10 and indicated that PBSP would arrange for an independent review of  
11 his case to determine the proper level of medication required.  
12 (Id. ¶ 303.)<sup>3</sup> The independent review was performed by Dr.  
13 Williams,<sup>4</sup> a PBSP physician, who changed Plaintiff's pain  
14 medication, after which Plaintiff experienced less pain and better  
15 sleep. (Id. ¶ 315.)

17 Defendant Sayre was aware of Plaintiff's long history of  
18 suffering from pain and failure to receive adequate medical  
19 treatment for it. Under these circumstances, Defendant Sayre's  
20 denial of Plaintiff's legitimate request for a change in his pain  
21 medications may have caused Plaintiff unnecessary pain. Defendant  
22 Sayre's delay in responding to Plaintiff's appeal also may have  
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25 <sup>3</sup>Although Plaintiff does not specify what part of his request  
26 Defendant Sayre denied, he must have denied Plaintiff's request for  
an immediate change in his pain medication.

27 <sup>4</sup>Dr. Williams' first name is not provided in the complaint.  
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1 caused him to experience unnecessary pain, especially in light of  
2 the fact that Defendant Sayre eventually granted Plaintiff's  
3 request to see a pain specialist. These allegations, therefore,  
4 are sufficient to state Eighth Amendment and negligence claims  
5 against Defendant Sayre.

6 5. Defendant McLean

7 Defendant McLean is the health care manager at PBSP. After  
8 Defendant Sayre had decided the 602 appeal discussed above,  
9 Plaintiff alleges that, on December 18, 2008, he submitted the  
10 appeal for second level review and that Defendant McLean affirmed  
11 Defendant Sayre's decision on January 8, 2009. (Id.) As discussed  
12 above, Defendant Sayre's denial of an immediate change of  
13 Plaintiff's medication may have caused him unnecessary pain. Thus,  
14 Defendant McLean's affirmance of this decision states cognizable  
15 Eighth Amendment and negligence claims.  
16

17 Plaintiff also alleges that, on April 8, 2008, Defendant  
18 McLean denied an appeal concerning the allegedly false entry in  
19 Plaintiff's medical record stating that he had a history of drug  
20 abuse. (Id. ¶ 287.) Although there is a First Amendment right to  
21 petition the government for redress of grievances, there is no  
22 right to a response or any particular action. Flick v. Alba, 932  
23 F.2d 728 (8th Cir. 1991) ("prisoner's right to petition the  
24 government for redress . . . is not compromised by the prison's  
25 refusal to entertain his grievance."). Thus, there is no  
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1 cognizable claim for denial of this 602 appeal.

2 6. Defendants Jacquez and Winslow

3 Plaintiff alleges that Defendant Jacquez, the Warden of PBSP,  
4 and Defendant Winslow, the statewide medical director of the CDCR,  
5 were aware of the illegal acts of the other Defendants and did  
6 nothing to take corrective action. (Id. ¶¶ 66-68.) This general  
7 allegation, without a specific allegation of an instance in which  
8 Defendants were presented with an opportunity to take corrective  
9 action, but did not, is not sufficient to establish a cognizable  
10 Eighth Amendment or negligence claim against them.

12 7. Defendant Cate

13 As with Defendants Jacquez and Winslow, Plaintiff alleges  
14 generally that Defendant Cate, Secretary of the CDCR, was aware of  
15 the illegal acts of the other Defendants and did nothing to take  
16 corrective action. (Id.) The only specific allegations concerning  
17 Defendant Cate are his failure to grant Plaintiff's 602 appeals.  
18 These allegations do not state a cognizable claim for relief.

19 E. Conclusion

20 In sum, Plaintiff's allegations establish a cognizable claim  
21 against Defendants Flowers, Risenhoover, Sayre and McLean for  
22 violation of the Eighth Amendment based on deliberate indifference  
23 to serious medical need. Plaintiff's allegations establish a  
24 cognizable state law claim for negligence against Defendants  
25 Flowers, Risenhoover, Sayre, McLean, Labans and Robinson.  
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## CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Plaintiff presents the following cognizable claims for relief:

a. An Eighth Amendment claim for deliberate indifference to serious medical need against Defendants Flowers, Risenhoover, Sayre and McLean.

b. A state law claim in negligence for breach of a professional duty of care against Defendants Flowers, Risenhoover, Sayre, McLean, Labans and Robinson.

2. Plaintiff's Eighth Amendment claims against Defendants Cate, Jacquez, Labans, Robinson, and Winslow and his state law negligence claims against Defendants Cate, Jacquez, and Winslow are DISMISSED WITH LEAVE TO AMEND. If Plaintiff wishes to pursue his claims against these Defendants, he must, within thirty (30) days of the date of this Order file an amended complaint containing only Eighth Amendment and state law negligence claims.<sup>5</sup> Failure to file an amended complaint will result in the dismissal with prejudice of the non-cognizable claims against the Defendants named in this

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<sup>5</sup> Plaintiff is advised to allege facts supporting his claims against each individual Defendant by listing the constitutional right that Defendant violated or the duty that Defendant breached, describing what each Defendant did or failed to do, on a date after June 18, 2007, and how each Defendant's acts or omissions caused him injury. An amended complaint need not contain Plaintiff's preliminary statement. The following paragraphs from the original complaint should not be included in an amended complaint because they support claims which are dismissed with prejudice, are excluded for reasons of res judicata, or are simply background information: 8-12, 14, 18-50, 64-75, 77-82, 183-275, 299-302, 317-321, 323-331.

1 paragraph.

2 3. The claims for conspiracy and any claims based upon events  
3 that took place prior to June 18, 2007, are DISMISSED WITH  
4 PREJUDICE.

5 4. Because Plaintiff is not proceeding in forma pauperis in  
6 this action, he may not rely on the United States Marshal for  
7 service of the summons and complaint without paying for this  
8 service. See Fed. R. Civ. P. 4(c)(3). Title 28 U.S.C.  
9 § 1921(a)(A) provides that the United States Marshal shall  
10 routinely collect, and the court may tax as costs, fees for serving  
11 a summons and complaint. Title 28 C.F.R. § 0.114(a)(3) provides  
12 that the United States Marshal shall collect a fee for personal  
13 service of a summons and complaint at the rate of \$55.00 per hour,  
14 or portion thereof, plus travel expenses. Consequently, Plaintiff  
15 may himself arrange for service of all of the Defendants against  
16 whom cognizable claims for relief have been found or he may request  
17 the Court to order the Marshal to do so. If Plaintiff wishes the  
18 Marshal to serve the summons and complaint, he must inform the  
19 Court of this within twenty days of the date of this Order and he  
20 must arrange to pay the required fee. Rule 4(m) of the Federal  
21 Rules of Civil procedure provides:

22 If service and summons of a complaint is not made upon a  
23 defendant within 120 days after the filing of the  
24 complaint, the court, upon motion or on its own  
25 initiative after notice to the plaintiff, shall dismiss  
the action without prejudice as to that defendant or  
direct that service be effected within a specified time  
. . .

26 Fed. R. Civ. P. 4(m).

27 5. Defendants are cautioned that Rule 4(d) of the Federal  
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1 Rules of Civil Procedure requires them to cooperate in saving  
2 unnecessary costs of service of the summons and complaint.  
3 Pursuant to Rule 4, if Defendants, after being notified of this  
4 action and requested by Plaintiff to waive service of the summons,  
5 fail to do so, they will be required to bear the cost of such  
6 service unless good cause be shown for their failure to sign and  
7 return the waiver form. If service is waived, this action will  
8 proceed as if Defendants had been served on the date that the  
9 waiver is filed, except that pursuant to Rule 12(a)(1)(A)(ii),  
10 Defendants will not be required to serve and file an answer before  
11 sixty (60) days from the date on which the request for waiver was  
12 sent. (This allows a longer time to respond than would be required  
13 if formal service of summons is necessary.) Defendants are asked  
14 to read the statement set forth at the foot of the waiver form that  
15 more completely describes the duties of the parties with regard to  
16 waiver of service of the summons. If service is waived after the  
17 date provided in the Notice but before Defendants have been  
18 personally served, the Answer shall be due sixty (60) days from the  
19 date on which the request for waiver was sent or twenty (20) days  
20 from the date the waiver form is filed, whichever is later.

21 6. Defendants shall answer the complaint in accordance with  
22 the Federal Rules of Civil Procedure. The following briefing  
23 schedule shall govern dispositive motions in this action:

24 a. No later than ninety (90) days from the date their  
25 answer is due, Defendants shall file a motion for summary judgment  
26 or other dispositive motion. The motion shall be supported by  
27 adequate factual documentation and shall conform in all respects to  
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1 Federal Rule of Civil Procedure 56. If Defendants are of the  
2 opinion that this case cannot be resolved by summary judgment, they  
3 shall so inform the Court prior to the date the summary judgment  
4 motion is due. All papers filed with the Court shall be promptly  
5 served on Plaintiff.

6 b. Plaintiff's opposition to the dispositive motion  
7 shall be filed with the Court and served on Defendants no later  
8 than sixty (60) days after the date on which Defendants' motion is  
9 filed. The Ninth Circuit has held that the following notice should  
10 be given to pro se plaintiffs facing a summary judgment motion:

11 The defendants have made a motion for summary  
12 judgment by which they seek to have your case dismissed.  
13 A motion for summary judgment under Rule 56 of the  
14 Federal Rules of Civil Procedure will, if granted, end  
15 your case.

16 Rule 56 tells you what you must do in order to  
17 oppose a motion for summary judgment. Generally, summary  
18 judgment must be granted when there is no genuine issue  
19 of material fact--that is, if there is no real dispute  
20 about any fact that would affect the result of your case,  
21 the party who asked for summary judgment is entitled to  
22 judgment as a matter of law, which will end your case.  
23 When a party you are suing makes a motion for summary  
24 judgment that is properly supported by declarations (or  
25 other sworn testimony), you cannot simply rely on what  
26 your complaint says. Instead, you must set out specific  
27 facts in declarations, depositions, answers to  
28 interrogatories, or authenticated documents, as provided  
in Rule 56(e), that contradict the facts shown in the  
defendant's declarations and documents and show that  
there is a genuine issue of material fact for trial. If  
you do not submit your own evidence in opposition,  
summary judgment, if appropriate, may be entered against  
you. If summary judgment is granted in favor of  
defendants, your case will be dismissed and there will be  
no trial.

25 Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

26 Plaintiff is advised to read Rule 56 of the Federal Rules of  
27 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)

1 (party opposing summary judgment must come forward with evidence  
2 showing triable issues of material fact on every essential element  
3 of his claim). Plaintiff is cautioned that because he bears the  
4 burden of proving his allegations in this case, he must be prepared  
5 to produce evidence in support of those allegations when he files  
6 his opposition to Defendants' dispositive motion. Such evidence  
7 may include sworn declarations from himself and other witnesses to  
8 the incident, and copies of documents authenticated by sworn  
9 declaration. Plaintiff will not be able to avoid summary judgment  
10 simply by repeating the allegations of his complaint.

11 c. If Defendants wish to file a reply brief, they shall  
12 do so no later than thirty (30) days after the date Plaintiff's  
13 opposition is filed.

14 d. The motion shall be deemed submitted as of the date  
15 the reply brief is due. No hearing will be held on the motion  
16 unless the Court so orders at a later date.

17 7. Discovery may be taken in this action in accordance with  
18 the Federal Rules of Civil Procedure. Leave of the Court pursuant  
19 to Rule 30(a)(2) is hereby granted to Defendants to depose  
20 Plaintiff and any other necessary witnesses confined in prison.

21 8. All communications by Plaintiff with the Court must be  
22 served on Defendants, or Defendants' counsel once counsel has been  
23 designated, by mailing a true copy of the document to Defendants or  
24 Defendants' counsel.

25 9. It is Plaintiff's responsibility to prosecute this case.  
26 Plaintiff must keep the Court informed of any change of address and  
27 must comply with the Court's orders in a timely fashion.

1        10. Extensions of time are not favored, though reasonable  
2 extensions will be granted. Any motion for an extension of time  
3 must be filed no later than seven days prior to the deadline sought  
4 to be extended.

5        IT IS SO ORDERED.

6  
7  
8 Dated: February 16, 2010

*Claudia Wilken*

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CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER,

Plaintiff,

v.

MATHEW CATE et al,

Defendant.

Case Number: CV09-02948 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 16, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Todd Ashker C58191  
D1-119  
Pelican Bay State Prison  
P.O. Box 7500  
Crescent City, CA 95532

Dated: February 16, 2010

Richard W. Wieking, Clerk  
By: Ronnie Hersler, Administrative Law Clerk

United States District Court  
For the Northern District of California